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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

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SPECIAL CIVIL APPLICATION No 1007 of 1996

MAHESHKUMAR JIVRAM CHAUHAN

Versus

PRANTIJ MUNICIPAL BOROUGH

Date of Decision:28-2-96

For Approval and Signature:

HONOURABLE MR. JUSTICE M.R. CALLA

1. Whether Reporters of Local Papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any other order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

Appearance:

Mr.B.R.Shah,learned Senior Counsel with
MR MS RAO for Petitioners
MR MR SHAH for Respondent No. 1
SERVED BY DS for Respondent No. 2, 3

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 28/02/96

Oral Judgment :

1. Heard learned counsel.

2. Rule. Mr.M.R.. Shah, learned counsel waives service of rule on behalf of respondent no.1. So far as respondents Nos. 2 and 3 are concerned they are only formal parties and no relief as such is sought against them. Therefore, there is no need to issue the notice of the Rule to respondents Nos.2 and 3 as the relief is sought against respondent No.1 forbearing it from terminating the services of the petitioners and for their regularization on permanent basis on regular pay scale. In these circumstances, on the request of the petitioners and the only contesting respondent No.1 the mater is taken up for final hearing right today.

3. This petition has been filed on behalf of two petitioners against the Prantij Municipal Borough on 5-2-96 against their apprehended termination and for regularization on permanent basis in regular pay scale. Mr. R.N.Shah had already entered Caveat on 1-2-96 and when the matter came up before the court on 7-2-96 an order was passed to issue notice to respondents Nos.2 and 3 and the same was made returnable on 16-2-96 and in terms of the order dated 7-2-96, the matter came up before this Court today.

4. It is not disputed that the petitioner No.1 joined the services of Prantij Nagar Panchayat in October 1989 and the petitioner No.2 joined the services of the Prantij Nagar Panchayat in February,1993. In April 1994 the Prantij Nagar Panchayat was converted into Municipal Borough by the State Government in exercise of the powers conferred under S.4A of the Gujarat Municipalities Act. It is the case of the Municipal Borough, Prantij, as stated by Mr.M.R.Shah, that both these petitioners were appointed in October 1989 and February 1993 on daily wages basis. In past on 1-11-94 the Administrator of the Prantij Muncipal Borough had orally terminated the services of the temporarily employed persons including the petitioners. On 1-11-94 itself the petitioners made a representation to the District Collector, Sabarkantha seeking his intervention. On 15-11-94 the District Collector, Sabarkantha directed the Administrator to reinstate the petitioners as the vacancies were available in the Prantij Municipal Borough against which the petitioners could be continued and accordingly the petitioners were reinstated. It is the case of the petitioners that the rest of the affected employees particularly on technical side moved Special Civil Application No.12837 of 1994 and a stay order was passed by this Court restraining the respondents from altering

the service conditions of the petitioners and it is also submitted that such stay order, as was passed in December, 1994, is still in force. The petitioners further stated that the State Government had issued a Notification directing that all the temporary employees, who have completed three years of service in tempoary/ad hoc capacity, should be absorbed against permanent posts in accordance with law and the remaining unfilled permanent posts, if any, should be filled up from out of the junior temporary employees. On 5-2-96 the petitioners filed this petition apprehending their termination and the prayer has been made for their regularization and absorption on permanent and regular basis against available permanent vacancies.

5. An affidavit-in-reply dated 15-2-96 was filed on behalf of respondent No.1 seeking to traverse the claim of the petitioners and, thereafter, an affidavit-in-rejoinder dated 22-2-96 was filed by the petitioners to which an affidavit-in-sur-rejoinder dated 26-2-96 has been filed and this completes the pleadings of the parties.

6. Although the petitioners had come to this Court with the case that their services were likely to be terminated without giving any notice and without following the proper procedure, the respondent No.1 has come with a categorical case that the services of the petitioners had been orally terminated on 1-2-96 itself. However, this Court on 7-2-96, while issuing the notice returnable on 16-2-96, ordered that in the meanwhile and until further orders the respondent No.1 shall take back the present petitioners on duty, and accordingly the petitioners are on duty at present as has been stated by Mr. M.R. Shah, learned counsel appearing for the Prantij Municipal Borough.

7. Mr. B.R.Shah appearing on behalf of the petitioners has submitted that accepting the case of the respondent-Municipal Borough that the services of the petitioners were terminated on 1-2-96, it becomes very clear that the termination has been brought about without any notice and without following the requirements of S.25F of the Industrial Disputes Act, 1947 (herein-after referred to as 'the Act'). In the body of the petition, without mentioning S.25F, all the facts with regard to the termination being brought about without notice, without following principle of first come last go, equal pay for equal work, unfair labour practice and that of discrimination etc. have been mentioned and it has been pleaded on the basis of the Notification issued by the

Government of Gujarat in August 1995 that the petitioners are entitled to be made permanent and regular against the permanent vacancies. Mr. B. R. Shah has submitted that the oral termination, which has been made effective from 1-2-96, is on the face of it unlawful as the same has been made effective without giving any notice or notice pay in lieu thereof and no retrenchment benefits as contemplated under S.25F of the Act have been paid as a condition precedent. It has been argued that the oral termination made effective from 1-2-96 had been issued in arbitrary exercise of power, it is unfair labour practice and the petitioners having completed the service of more than 240 days, were entitled to the protection of S.25F of the Act and they were also entitled to be made permanent and absorbed on regular basis since the vacancies are available and that they deserve to be paid in accordance with the principle of equal pay for equal work. The case of the respondent-Municipal Borough, as has been argued by Mr. M.R. Shah, is that the Municipality is facing a great financial crisis. It has liabilities to the tune of Rs.27 lacs, the petitioners had been appointed by way of backdoor entry by the then President and now as a measure of economic cut the President and the functionaries at the helm of affairs of this Municipal Borough had decided to terminate the services of the employees like the petitioners and such orders have been issued in many other cases and further that these two petitioners, having been appointed on daily wages basis only, were not entitled to the protection of S.25F of the Act and, therefore, no notice or giving the pay in lieu of notice or the following of requirements of S.25F of the Act was necessary. He has further argued that since the petitioners are daily wagers, every day there is a new contract and, therefore, it is not a case of retrenchment in accordance with the provisions of S.2(oo)(bb) of the Act. Mr. M.R.Shah appearing for the Municipal Borough has also placed reliance on JT 1995(1) S.C. 198 (M.P. Hasta Shilpa Vikas Nigam Ltd. v. Devendra Kumar Jain and others) and on 1996(1) G.L.H. 108 (Nilesh Bhatt v. A.O., Nagar Prathmik Shikshan Samiti).

8. Having heard the submissions made at the Bar and having gone through the available pleadings and the documents filed by the parties, I am of the opinion that so far as the regular appointments and the making the petitioners permanent in the establishment of the Municipal Borough are concerned, the maters are governed by the Service Rules framed under the Gujarat Municipalities Act and, therefore, for the purpose of permanent absorption and regular appointment, the

petitioners will have to face the process of regular recruitment under the relevant Service Rules as and when the recruitment is held by the Municipality.

9. For the purpose of continuance of the present petitioners, it is submitted by learned counsel Mr. M.R.Shah appearing for the Municipal Borough that the case of the petitioners that vacancies are available is factually incorrect. According to him sufficient number of vacancies are not available against which the petitioners can be continued and even otherwise the Municipal Borough has decided to give effect to the termination of the petitioners and certain other employees as an economic drive. That may be so, but the fact remains that the factum of the completion of more than 240 days in the service of the Municipal Borough by the petitioners is admitted and once it is agreed that they had joined the service in October 1989 and February 1993 respectively, it has to be agreed on all hands that they might have been working in any capacity, they have completed at least 240 days continuous service so as to entitle them to the protection of S.25F of the Act. The case of the respondent-Municipal Borough that the petitioners are only daily wagers and, therefore, they are not entitled to the protection of S.25F of the Act, because every day there is a new contract of service, is not acceptable for the simple reason that factually the petitioners have completed continuous service of more than 240 days since October 1989 and February 1993. It was not a case in which any fixed term appointment was given to the petitioners indicating that the contract of service would come to an end on such and such date or that the appointment would stand determined by any terms of the contract. In fact, there is no appointment order whatsoever. They were appointed by verbal orders as daily wagers and in the same manner on one fine morning on 1-2-96 they are taken by surprise that they are no more in service. It is, therefore, clear that there was an element of total uncertainty with regard to the period of their appointment and, therefore, it will be a misnomer to call it a fixed term appointment. Fixed term appointment would mean two terminal points; one point when the employment commences and the other point when the employment ceases. In case of fixed term appointment, the point of commencement and the point of cessation of the employment is already determined and only in such cases when the termination is automatic by the terms of the contract itself or it is brought about by the very condition of the terms of the contract of the employment that an argument with reference to S.2(oo)(bb) can be raised. The facts of the present case do not

give any indication that it was a case of fixed term appointment or that the appointment was to come to an end by efflux of time or on 1-2-96. In case of daily wagers, if the argument is accepted that it is a case of a new contract every day, it would be arming the employer with such a weapon so as to exercise the power of termination with the aid of S.2(oo) (bb) against all daily wagers in such a manner so as to thwart the very purpose of the object with which the handsome provisions like S.25F were included in this beneficial piece of Legislation for maintaining industrial peace and harmony in the industries, which are functioning in the country. Such a laudable object which the Legislature cherished the most and which has been reflected through out the fibre of the Industrial Law can not be made to be defeasible at the hands of such a proposition as has been canvassed by Mr. M.R. Shah on behalf of the Municipal Borough and, therefore, this contention raised by Mr. M.R. Shah is hereby rejected.

10. Since oral appointments and the oral terminations are creating such disputes in large number of cases, it has become necessary to observe that the practice of giving appointments by oral orders and terminating the services by oral orders even by the bodies like the Municipalities has to be deprecated. Municipal Borough is a body which is functioning as a Corporate Body under the law, it has got its own regular establishment and one fails to understand as to why the bodies like Municipalities can not pass appropriate orders defining the terms of the contract right at the time of giving appointment and in any case at the time of passing the termination orders why formal orders terminating the services can not be drawn. The practice of passing oral orders and terminating the services of the daily wagers by oral orders even at the stage when they have completed several years of service cannot be said to be a healthy practice, if at all a charitable view is taken that it is not an unfair labour practice. In case the definite orders are passed and are timely served, the attention of the authors of such orders would automatically go to the relevant provisions of law as to whether such provisions have been followed or not. But in case of oral orders nothing can be said; who took the decision, who passed the order, who conveyed the order, for what reason the order has been passed and thereby all concerned are left in lurch to speculate and think the basis as well as the reasons for passing of such orders. This practice of passing oral order is, therefore, strongly deprecated with a hope to the responsive bodies like Municipalities that such a practice of passing verbal orders would be

immediately stopped.

11. So far as the case of M.P. Hasta Shilpa Vikas Nigam Ltd.(Supra) is concerned, the decision on which the reliance has been placed by Mr. M.R.Shah on behalf of the respondent-Municipal Borough, it may be straightaway observed that, that is a case in which the Supreme Court considered the scope of Article 311 of the Constitution and all that has been laid down by the Supreme Court is a well known and well settled principle right from Purushottam Lal Dhingara's case that in case of appointment on temporary posts, a servant, who is appointed temporarily, does not acquire any substantive right to the post. This proposition is entirely different and has no application to the facts of present case so as to see as to whether the petitioners were entitled to the protection of S.25F of the Act or not. It is not the case of simply a civil servant. Once a civil servant enjoys the status of a workman, he has rights under the provisions of Industrial Disputes Act and such rights can not be determined on the basis of the title to the post. Whether the present petitioners have any substantive right to the post or not is a different question altogether and I have already observed in the earlier part of the order that so as to get a regular appointment they have to go through the process of regular recruitment, but for other rights under S.25F of the Act, they vest in a workman if he has completed 240 days continuous service and in case the cessation of employment is brought about by any reason other than misconduct, whether it is on account of economic cut or for any other reason, it will be a case of retrenchment as has been held by the Supreme Court in umpteen number of cases. Therefore, in my view, the proposition laid down in M.P. Hasta Shilpa Vikas Nigam Ltd.'s case is of no avail to the Prantij Municipal Borough in the facts of this case. In the case of Nilesh Bhatt v. A.O., Nagar Prathmik Shikshan Samiti (Supra) decided by single Judge of this Court, the Court has considered the cases of ad hoc appointees - civil servants. It was a case in which a fixed term appointment was given and the Court held that termination of an incumbent appointed on a fixed term on a temporary basis can be effected without notice or hearing and principles of natural justice need not be followed and it has been held that termination without notice in such cases is implied from the terms of the appointment and in this context it was observed that those who are given appointments for fixed terms, which in that case was one year, were not entitled to any opportunity of hearing or a prior notice as the services were not extended beyond the period of one year and the

appointment came to an end by efflux of time. Such is not the fact situation in the present case and, therefore, this decision in case of Nilesh Bhatt (Supra) rendered by a single Judge of this Court also does not help the case of the respondent-Municipal Borough in any manner. In the facts of the present case, there being no dispute that the petitioners had been appointed in October 1989 and February 1993, they had completed more than 240 days of service and they were entitled to the protection of S.25F of the act, which has not been followed as a condition precedent and prerequisite. The termination can not be said to be lawful and the petitioners have to be allowed to continue in the service.

12. The upshot of the aforesaid discussion is that this Special Civil Application succeeds. The termination of the present petitioners brought about by the respondent-Municipal Borough from 1-2-96 is declared to be unlawful and the petitioners shall be deemed to be continuing in service with all consequential benefits as if their services had not been terminated on 1-2-96 subject to the condition that for the purpose of regular appointment they will have to undergo the process of regular recruitment as and when recruitment is held and for retrenchment it will be open for the respondent-Municipal Borough to pass any order in accordance with law after following the relevant provisions of law. Rule is made absolute accordingly with no order as to costs.

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